should not be permitted to engage in joint marketing.[371] Several commenters also propose restrictions that appear to go beyond those adopted in the Computer II proceeding, including a prohibition on shared administrative services,[372] a complete prohibition on common use of any leased or owned physical space,[373] a prohibition on jointly owned property,[374] and a complete prohibition on joint research and development, including joint equipment design.[375]

155. Other commenters propose that "the standards for independent operation established in the Competitive Carrier decision are the most appropriate for this section of the Act."[376] Suggesting that two of the three requirements are implemented elsewhere in section 272, they generally propose that we read "operate independently" to forbid joint ownership of transmission and switching facilities.[377] Other parties advocate that we adopt individual requirements, rather than a particular set of structural separation requirements established in another context, or

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as a guide). But see CompTel at 15-16 (proposing safeguards devised by DOJ in response to Ameritech's Customers First Plan, Ameritech's plan to offer in-region interLATA service through an interexchange affiliate).

[371] E.g., AT&T at 57; MFS at 15-16 (also reading provision to forbid BOC and affiliate to refer customers to one another or to jointly advertise but to require the entities to have "separate logos, distinct names, no shared customer databases or information systems, and separate billing, collections, and ordering processes"); TIA at 22; see also CompTel at 16 (advocating that affiliate be forbidden to use BOC's brand name).

[372] E.g., CompTel at 19-20; ITAA at 18-19; MCI Reply at 2 (advocating administrative separation); TIA at 22-23, 25 n.55; TRA at 13-14.

[373] E.g., ITAA at 17 (advocating no sharing of property); MCI at 23; Sprint at 21-23 (advocating prohibition on common use of switches, facilities, buildings, and space); see also CompTel at 16 (advocating prohibition on sharing or co-location of facilities, assets, and personnel, except leasing telecommunications equipment space in same building and sharing power equipment on same terms, rates, and conditions available to nonaffiliated interexchange carriers); IDCMA at 5 (advocating physically separate facilities).

[374] E.g., ITAA at 17; ITI & ITAA Reply at 10-11; MCI at 23-24 (advocating prohibition on joint use or ownership of property); Sprint at 21-22.

[375] E.g., AT&T at 23 (urging us to preclude joint planning and joint services development); IDCMA at 5-6; MCI at 27; TIA at 22-23; TRA at 13.

[376] NYNEX Reply at 17-18; Teleport at 19; see also CompTel at 15 n.44 (proposing these standards as a minimum to be supplemented); Frontier at 4-5 (advocating standards as a minimum); PacTel Reply at 10 (stating that if additional restrictions are necessary, Competitive Carrier requirements are the most appropriate). In contrast, several commenters state that the structural safeguards established in the Competitive Carrier proceeding would be insufficient to protect ratepayers or establish operational independence. E.g., AT&T at 23; IDCMA at 3; ITAA at 18-19 & n.53.

[377] E.g., NYNEX Reply at 17-18; Teleport at 19; see also Excel at 8; Frontier at 4-5 (contending that requirement would force BOC affiliates, like competitors, to invest capital and resources in interexchange business).

recommend that we use other proceedings in which structural separation was imposed as a guide.[378]

3. Discussion

156. We adopt our tentative conclusion that the "operate independently" requirement of section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5). This conclusion is based on the principle of statutory construction that a statute should be construed so as to give effect to each of its provisions.[379]

157. Relationship of Section 272(b)(1) to Section 274(b). Section 274(b) mandates that a separated affiliate or electronic publishing joint venture be "operated independently" and then lists nine specific requirements governing the relationship between a BOC and a separated affiliate. In contrast, section 272(b) imposes five structural and transactional requirements governing the relationship between a BOC and a section 272 affiliate, one of which is that the affiliate "shall operate independently from the [BOC]." The structural differences in the organization of the two sections suggest that the term "operate independently" in section 272(b)(1) should not be interpreted to impose the same obligations on a BOC as section 274(b). In particular, while the enumerated requirements of section 274(b) may be interpreted to define the term "operated independently" in that context, they do not define the term "operate independently" as used in section 272(b).[380] We agree with SBC that, because the requirements listed in sections 274(b)(1)-(9) of the Act overlap with the requirements of sections 272(b), (c), and (e), it would be redundant to incorporate all of the section 274(b) requirements into the "operate independently" requirement of section 272(b)(1).[381]

158. Defining "Operate Independently." The requirements that we adopt to implement section 272(b)(1) are intended to prevent a BOC from integrating its local exchange and exchange access operations with its section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute. In order to protect against the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate's competitors' operating less efficiently, we seek to ensure that a section 272 affiliate and its competitors enjoy the same level of access to the BOC's

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[378] E.g., Excel at 6 (advocating adoption of Computer II and Competitive Carrier requirements as appropriate); Sprint at 20-21 (advocating that we seek guidance in interpreting the provision from the orders pursuant to which GTE Corporation was permitted to acquire Sprint's long distance predecessors in interest and urging us to read the provision to limit a BOC's ability to engage in common activities with a section 272 affiliate through its parent company); TIA at 23-25 (noting that neither the Computer II nor Competitive Carrier proceedings addressed cross-subsidy and discrimination issues associated with BOC entry into manufacturing); TRA at 13.

[379] 2A Singer, supra note 362, at § 46.06; see Notice at ¶ 57.

[380] See SBC Reply at 20 n.33. We will construe the "operated independently" language of section 274(b) in a separate proceeding and do not purport to do so at this time. See Electronic Publishing NPRM at ¶ 35.

[381] See SBC Reply at 20 n.33.

transmission and switching facilities. Accordingly, we conclude that operational independence precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located. Furthermore, operational independence precludes a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's facilities. Likewise, it bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated. Consistent with these requirements and those established pursuant to sections 272(b)(5) and 272(c)(1), a section 272 affiliate may negotiate with an affiliated BOC on an arm's length and nondiscriminatory basis to obtain transmission and switching facilities, to arrange for collocation of facilities, and to provide or to obtain services other than those expressly prohibited herein.

159. We agree with several commenters that joint ownership of transmission and switching facilities and the property on which they are located would permit such substantial integration of the BOCs' local operations with their interLATA activities as to preclude independent operation, in violation of section 272(b)(1).[382] Imposing a prohibition on such joint ownership also avoids the need to allocate the costs of such transmission and switching facilities between BOC activities and the competitive activities in which a section 272 affiliate may be involved. We agree with the claims of some commenters that, because the costs of wired telephony networks and network premises are largely fixed and largely shared among local, access, and other services, sharing of switching and transmission facilities may provide a significant opportunity for improper allocation of costs between the BOC and its section 272 affiliate.[383]

160. By prohibiting joint ownership of transmission and switching facilities, we also reduce the potential for a BOC to discriminate in favor of its section 272 affiliate. Consistent with this purpose, we define transmission and switching facilities broadly to include the facilities used to provide local exchange and exchange access service. The prohibition ensures that a section 272 affiliate must obtain any such facilities pursuant to section 272(b)(5), which requires all transactions between a BOC and its section 272 affiliate to be on an arm's length basis and reduced to writing. Requiring section 272 affiliates to obtain transmission and switching facilities from a BOC on an arm's length basis will increase the transparency of such transactions, thereby facilitating monitoring and enforcement of the section 272 requirements. Moreover, a section 272 affiliate and its interLATA competitors will have to follow the same procedures when obtaining services and facilities from a BOC. As described below, sections 272(c)(1) and (e) require a section 272 affiliate to obtain services and facilities on the same rates, terms, and conditions

[382] See, e.g., Frontier at 4-5; ITAA at 17; MCI at 24; Sprint at 21-23; Sprint Reply at 24-25; TRA at 13.

[383] See Letter From Leonard J. Cali, General Attorney, AT&T, to William F. Caton, Acting Secretary, FCC, filed Oct. 4, 1996 (AT&T Oct. 4 Ex Parte); Excel at 5-6; Sprint at 22-23.

available to unaffiliated entities. Contrary to the suggestion of some commenters,[384] those nondiscrimination safeguards would offer little protection if a BOC and its section 272 affiliate were permitted to own transmission and switching facilities jointly. To the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate. Together, the prohibition on joint ownership of facilities and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.

161. The requirement that a BOC and its section 272 affiliate not commonly own the land and buildings where their transmission and switching facilities are located, like the prohibition on joint ownership of facilities, should ensure that a section 272 affiliate and its competitors both receive the best available access to transmission and switching facilities. It does not, however, preclude a section 272 affiliate from collocating its equipment in end offices or on other property owned or controlled by its affiliated BOC. Rather, as IDCMA recognizes, the requirement should ensure that collocation agreements between a BOC and its section 272 affiliate are reached pursuant to arm's length negotiations and that the same collocation opportunities are available to similarly situated non-affiliated entities.[385] Moreover, the ban on joint ownership of facilities should protect local exchange competitors that request physical collocation by ensuring that a BOC's section 272 affiliate does not obtain preferential access to the limited available space in the BOC's central office.[386]

162. We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources. We find that joint ownership of other property, such as office space and equipment used for marketing or the provision of administrative services, may provide economies of scale and scope without creating the same potential for discrimination by

[384] See SBC Nov. 14 Ex Parte at 7-8 (arguing that "as long as the BOC affiliate's joint use or sharing of switching, transmission, or computer facilities is nondiscriminatory and otherwise complies with the terms of Section 272, it should be allowed"); USTA Reply at 7.

[385] IDCMA at 5 n.11.

[386] Section 251(c)(6) of the Act requires a BOC to provide for physical collocation of a requesting carrier's equipment necessary for interconnection unless it can demonstrate "that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6); see First Interconnection Order at ¶ 267.

the BOCs. Moreover, we believe that the Commission's accounting rules;[387] the separate books, records, and accounts requirement of section 272(b); and the audit requirement of section 272(d) provide adequate protection against the potential for improper cost allocation.

163. We further conclude that allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1). Regardless of whether the BOC or the section 272 affiliate were to provide such services, we agree with AT&T that allowing the same individuals to perform such core functions on the facilities of both entities would create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized.[388] We conclude, as we did in the BOC Separations Order, that allowing the sharing of such services would require "excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier . . . to audit and monitor the accounting plans necessary for such sharing to take place."[389] Accordingly, we read section 272(b)(1) to bar a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities. As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.

164. We clarify that section 272(b)(1) does not preclude a BOC or a section 272 affiliate from providing telecommunications services to one another, so long as each entity performs itself, or obtains from an unaffiliated third party, the operating, installation, and maintenance functions associated with the facilities that it owns or leases from an entity unaffiliated with the BOC. In particular, if a section 272 affiliate obtains unbundled elements from a BOC, that BOC can perform the operating, installation, and maintenance functions associated with those facilities. Moreover, we recognize the need for an exception to the prohibition on shared operating, installation, and maintenance services to allow the BOC to obtain

[387] See 47 C.F.R. §§ 32.27, 64.901-64.904.

[388] AT&T Oct. 4 Ex Parte.

[389] See BOC Separations Order, 95 FCC 2d at 1144, ¶ 70 (rejecting BOCs' argument that their enhanced services and CPE separate subsidiaries should be able to contract with regulated operations for provision of engineering, installation and maintenance, and similar services).

support services for sophisticated equipment purchased from the affiliate on a compensatory basis.[390] For instance, the BOC could contract with the section 272 affiliate for the installation, maintenance, or repair of equipment, or the affiliate could train the BOC's personnel to perform such functions. We further note that the limited prohibition on shared services that we adopt is consistent with section 272(e)(4), which states that a BOC or BOC affiliate that is subject to section 251(c) "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions."[391] As we discuss below, section 272(e)(4) does not grant a BOC the authority to provide particular services to its affiliate, but rather prescribes the manner in which a BOC must provide those services that it is otherwise authorized to provide.[392] Thus, section 272(e)(4) does not grant a BOC the authority to provide operating, installation, and maintenance services associated with the facilities that a section 272 affiliate owns or leases from a provider other than the BOC.

165. In imposing these requirements, we reject the contention of some commenters that Congress considered and rejected a prohibition on the joint ownership of telecommunications transmission or switching equipment or other property.[393] Although the House bill contained such a prohibition, the Senate bill did not.[394] The Joint Explanatory Statement indicates merely that the conference committee adopted the Senate version of this provision with several modifications and does not offer any specific explanation for the exclusion of the joint ownership restriction.[395] In these circumstances, our obligation is to interpret the language of section 272(b)(1) in a manner consistent with its purpose, which is to ensure the operational independence of a section 272 affiliate from its affiliated BOC.[396]

166. The limited prohibition on shared services that we impose rests on the "operate independently" requirement of section 272(b)(1), rather than the requirement of section 272(b)(3) that a BOC and its section 272 affiliate have "separate officers, directors, and employees."[397]

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[390] See Computer II Final Order, 77 FCC 2d at 477, ¶ 239 (adopting a similar exception to a prohibition on shared services).

[391] 47 U.S.C. § 272(e)(4).

[392] See infra part VI.D.

[393] U S West Reply at 9 n.25; see also USTA Reply at 7-8.

[394] See H.R. 1555, 104th Cong., 1st Sess., § 246 (1995); S. 652, 104th Cong., 1st Sess. § 252 (1995).

[395] Joint Explanatory Statement at 152.

[396] See, e.g., Mead Corp. v. Tilley, 490 U.S. at 723 (refusing to draw inference from change in committee draft of bill); Rastelli v. Warden, 782 F.2d at 24 n.3 (declining to draw conclusions from ambiguous indications of statutory purpose); Drummond Coal v. Watt, 735 F.2d at 474 (concluding that "[u]nexplained changes made in committee are not reliable indications of congressional intent").

[397] 47 U.S.C. § 272(b)(3).

Accordingly, we reject the statutory construction argument advanced by several BOCs, which is predicated on the text of the latter provision. Those BOCs argue that, if a rule against separate employees were sufficient to prevent the sharing of in-house services, Congress would not have prohibited a BOC from engaging in purchasing, installation, maintenance, hiring, training, and research and development for the separated affiliate, in addition to forbidding the BOC and its separated affiliate from having common officers, directors, and employees, in section 274(b).[398]

167. We believe it is consistent with both the letter and purposes of section 272 to strike an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination. We decline to impose additional structural separation requirements given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272. In combination with the accounting protections established in the Accounting Safeguards Order, we believe the requirements set forth herein will protect against potential anticompetitive behavior.

168. In particular, we decline to read the "operate independently" requirement to impose a prohibition on all shared services.[399] We recognize the inherent tension between the "operate independently" requirement and allowing the integration of services. As we discuss further below, however, we believe the economic benefits to consumers from allowing a BOC and its section 272 affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for competitive harm created thereby.[400] Therefore, we permit the sharing of administrative and other services.[401] For example, we read section 272(b)(1) not to preclude a BOC and a section 272 affiliate from contracting with one another to provide marketing services.[402]

169. In construing other provisions of section 272, we address the concerns of those commenters who urge us to interpret section 272(b)(1) to prohibit a BOC and a section 272 affiliate from engaging in various forms of joint research and development.[403] As a preliminary matter, we note that the MFJ Court considered equipment design and development to be an

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[398] E.g., Ameritech at 42; BellSouth at 31 n.79; U S West at 24.

[399] We further discuss our reasons for declining to do so in connection with our analysis of section 272(b)(3), below.

[400] See infra paragraph 179.

[401] See infra part IV.C.

[402] We further discuss the marketing provisions below in our analysis of section 272(g).

[403] E.g., AT&T at 23 ; IDCMA at 5-6; MCI at 27; TIA at 22-23; TRA at 13.

integral part of "manufacturing," as the term was used in the MFJ.[404] We emphasize that to the extent that research and development is a part of manufacturing, it must be conducted through a section 272 affiliate, pursuant to section 272(a).[405] To the extent that a BOC seeks to develop services for or with its section 272 affiliate, the BOC must develop services on a nondiscriminatory basis for or with other entities, pursuant to section 272(c)(1).[406]

170. Finally, although a number of commenters support a Computer II-type prohibition on a section 272 affiliate's ability to construct, own, or operate its own local exchange facilities,[407] we conclude that such a prohibition is not required by the language of section 272(b)(1). As several BOCs suggest, limiting a section 272 affiliate to resale would not necessarily increase the affiliate's operational independence, particularly if the affiliate had to acquire facilities from its affiliated BOC as a result of the requirement.[408]

C. Section 272(b)(3) and Shared Services

1. Background

171. In the Notice, we tentatively concluded that the section 272(b)(3) requirement that a BOC and its section 272 affiliate have "separate officers, directors, and employees"[409] prohibits the sharing of in-house functions, including operating, installation, and maintenance, as well as administrative services.[410] We noted that, pursuant to the Computer II proceeding, the Commission allowed AT&T and its enhanced services subsidiaries to share certain administrative services -- accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services [411] -- on a cost reimbursable basis, but required the subsidiary to have its own operating, marketing, installation, and maintenance personnel for the services and

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[404] See, e.g., United States v. Western Elec. Co., 675 F. Supp. 655, 662-63, 667-68 (D.D.C. 1987), aff'd 894 F.2d 1387 (D.C. Cir. 1990).

[405] We will address the scope of the BOC's authority to engage in manufacturing activities further in our proceeding to implement section 273 of the Act. See Manufacturing NPRM.

[406] See infra part V.B.

[407] E.g., AT&T at 20-22; Time Warner at 17-18.

[408] See Ameritech Reply at 10; BellSouth Reply at 19.

[409] 47 U.S.C. § 272(b)(3).

[410] Notice at ¶ 62.

[411] Computer II Reconsideration Order, 84 FCC 2d at 84-85,¶ 102.

equipment it offered.[412] We sought comment on whether section 272(b)(3) forbids the sharing of outside services or other types of personnel sharing.[413]

172. In the context of our discussion of section 272(g), we sought comment on the related question of whether a section 272 affiliate must purchase marketing services from an affiliated BOC on an arm's length basis, pursuant to section 272(b)(5). Moreover, we sought comment on whether it is necessary to require a BOC and its section 272 affiliate to contract jointly with an outside marketing entity for joint marketing of interLATA and local exchange services in order to comply with section 272(b)(3). Finally, we invited parties to comment on the corporate and financial arrangements that are necessary to comply with sections 272(g)(2), 272(b)(3), and 272(b)(5).[414]

2. Comments

173. Sharing of Services. The BOCs, USTA, and the Yellow Pages Publishers Association argue that section 272(b)(3) does not preclude the sharing of "in-house" services, those services provided by a BOC or its separate affiliate.[415] Similarly, they assert that section 272(b)(3) does not prohibit BOC employees from performing marketing services on behalf of a section 272 affiliate.[416]

174. In response, a majority of commenters contend that section 272(b)(3) supports a broad prohibition on the sharing of services.[417] For instance, AT&T argues that BOC personnel should not be involved in any way in the activities of the section 272 affiliate, and vice versa.[418] MFS urges us to construe section 272(b)(3) to mean that employees may provide services only

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[412] Computer II Final Order, 77 FCC 2d at 477, ¶ 239.

[413] Notice at ¶ 62.

[414] Id. at ¶ 92.

[415] E.g. Ameritech at 41; Bell Atlantic Reply at 3-4; Bell Atlantic at 6-7; BellSouth at 31; PacTel at 21-22; U S West at 22-24; USTA at 21; YPPA at 7-8.

[416] E.g., Ameritech at 51; Ameritech Reply at 26-27; BellSouth at 10 & n.17; U S West at 27-28.

[417] E.g., DOJ Reply at 10; Florida Commission Reply at 3-5 (urging us to read section 272(b)(3), in concert with section 272(b)(1), to preclude sharing of administrative services, as well as sharing of operating, installation and maintenance personnel, research and development activities, and marketing); ITAA at 19; MCI at 27-28 (arguing that allowing a BOC to provide services for a section 272 affiliate that would otherwise have been performed by the affiliate's own employees would undermine the separate employees requirement); MCI Reply at 2; Teleport at 20; TIA at 27; Time Warner at 18-19; TRA at 13-14.

[418] AT&T at 24.

for the BOC or its section 272 affiliate, not both.[419] In particular, interexchange carriers construe section 272(b)(3) as imposing a variety of restrictions on joint marketing activities. AT&T contends that a BOC and its affiliate may each jointly market exchange and interexchange services, but may not integrate their marketing operations or their product design and development.[420] Whereas, MCI argues that joint marketing must be conducted either by the BOC or its section 272 affiliate, but not both.[421] Finally, Sprint maintains that BOC employees may not market the section 272 affiliate's services, because they are not employed by the BOC affiliate.[422]

175. Services Provided by an Outside Entity. The BOCs and USTA argue that neither the statute nor legislative history can be read to prohibit a BOC and its section 272 affiliate from obtaining services from the same outside provider.[423] Sprint does not object to such sharing "provided that each [party] pays fair market value in writing for those services."[424] Other commenters contend, however, that sharing a common outside provider creates the same opportunity for improper cost allocation as the sharing of in-house services.[425] Several commenters suggest that we place specific limits on outside contracting.[426]

176. Sprint and Time Warner argue that we should require a BOC and its section 272 affiliate to contract with an outside firm for the provision of joint marketing and advertising

[419] MFS Reply at 19-20.

[420] AT&T Reply at 31.

[421] MCI at 48.

[422] Sprint Reply at 27-28.

[423] E.g., Ameritech at 40; Bell Atlantic at 7; BellSouth at 31; PacTel at 23; SBC Reply at 8-9; USTA at 20-21.

[424] Sprint at 26 n.19.

[425] E.g., AT&T at 25; see also CompTel at 18-20; TIA at 23, 27 (arguing that together with the "operate independently" requirement, section 272(b)(3) forbids such sharing); TIA Reply at 9; TRA at 14.

[426] MCI at 28 (urging us to allow outsourcing only for "those services and functions that the BOC outsourced prior to the date of passage of the 1996 Act" and to require any sharing of outside services to be performed in accordance with requirements of section 272(b)(5)); Time Warner at 19-20 (suggesting we should allow such sharing only "where that third party actively provides services to other firms at large" and, in any event, prohibit it in the context of accounting and auditing).

services.[427] The BOCs and the Citizens for a Sound Economy Foundation object to the proposed requirement on the grounds that it would be contrary to the statute.[428]

177. Other Activities. AT&T argues that we "should prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa."[429] The BOCs generally reply that there is no statutory basis for such a requirement, which would "deny the RBOC the ability to utilize stock-based compensation plans (e.g., stock options), a common compensation mechanism" and "powerful recruiting tool" used in the industry.[430]

3. Discussion

178. Sharing of Services. Based on the record before us, we decline to prohibit the sharing of services other than operating, installation, and maintenance services, as described above.[431] We clarify that "sharing of services" means the provision of services by the BOC to its section 272 affiliate, or vice versa. In response to our tentative conclusion on this issue in the Notice, the BOCs have argued persuasively that such a prohibition is neither required as a matter of law, nor desirable as a matter of policy. We note that section 272(b)(3) on its face is silent on the issue of shared services. We are persuaded by the arguments of the BOCs that the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate.[432] Thus, as MFS asserts, an

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[427] Time Warner at 25; Sprint at 49 (asserting that although the statute does not require such a restriction, it would facilitate monitoring of such joint activities); Sprint Reply at 28; see also Florida Commission Reply at 4-5 (seeking a requirement that "an independent third party" provide such services, to the extent they are provided by a single entity). But see AT&T at 57 (concluding it may be possible for a BOC and its section 272 affiliate to contract with the same outside marketing entity for any joint marketing of interLATA and local exchange service, provided that the contract does not extend beyond marketing to joint services and development and planning).

[428] E.g., Ameritech at 51-52; BellSouth at 10; Citizens for a Sound Economy Foundation Reply at 4; NYNEX Reply at 16; PacTel at 41; PacTel Reply at 25.

[429] AT&T at 26; see also CompTel at 15-16 (advocating a similar requirement pursuant to section 272(b)(1)).

[430] See, e.g., Ameritech Reply at 12-13; see also U S West Reply at 12 n.36.

[431] See part IV.B.

[432] See, e.g., Ameritech at 41; BellSouth at 31; YPPA at 7-8; see also SBC Nov. 14 Ex Parte at 3 (reading the "operate independently" requirement to mandate that a section 272 affiliate have a separate board of directors, chief executive officer, chief financial officer, and operating personnel, each of whom is not also an officer, director, or employee of the affiliated BOC). Although AT&T cites the legislative history of section 272 for the proposition that Congress intended to achieve "fully separate operations" between a BOC and its section 272 affiliate, the carrier cites to language from the House Report regarding the House bill. See AT&T at 24; see also H.R. 1555, 104th

individual may not be on the payroll of both a BOC and a section 272 affiliate.[433] As discussed below, to the extent that a BOC provides services to its section 272 affiliate, it must provide them to other entities on the same rates, terms, and conditions, pursuant to section 272(c)(1).[434]

179. We also decline to impose a prohibition on the sharing of services other than operating, installation, and maintenance services, on policy grounds. We find that, if we were to prohibit the sharing of services, other than those restricted pursuant to section 272(b)(1), a BOC and a section 272 affiliate would be unable to achieve the economies of scale and scope inherent in offering an array of services.[435] We do not believe that the competitive benefits of allowing a BOC and a section 272 affiliate to achieve such efficiencies are outweighed by a BOC's potential to engage in discrimination or improper cost allocation. As we have noted, the Commission permitted the sharing of administrative services in the Computer II Final Order, on the grounds that "[w]ith an appropriate accounting system, whatever administrative efficiencies may exist are preserved."[436] We reject the arguments of some parties that, because of changes in the telecommunications marketplace and the language of the 1996 Act, a different outcome is warranted in this case.[437]

180. We recognize that allowing the sharing of in-house services will require a BOC to allocate the costs of such services between the operating company and its section 272 affiliate and provide opportunities for improper cost allocation, exchanges of information, and discriminatory treatment that may not be revealed in a subsequent audit.[438] Indeed, in the Computer II proceeding, the Commission indicated that a major reason for prohibiting the sharing of particular services, such as marketing services, was its desire to eliminate "the inherent

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Cong., 1st Sess., § 246 (1995). As discussed above, the section 272 requirements were taken from the Senate bill with several modifications. Joint Explanatory Statement at 152.

[433] MFS Reply at 20.

[434] See infra part V.B.

[435] See, e.g., Ameritech at 43-45; Bell Atlantic at 7; Bell Atlantic Comments, Exhibit 2 at 3-4 (predicting prohibition on shared administrative services would increase costs by as much as 15 percent); USTA at 22; USTA Reply, Haussman Affidavit at 9 (stating that "[a]dministrative services are a classic example of a situation where common costs are an important component of overall costs"); see also Sprint Reply Comments at 24 (stating that the "operate independently" requirement should not be interpreted to prevent the parent holding company of a BOC and its section 272 affiliate to provide various services and perform various functions for both entities).

[436] Computer II Final Order, 77 FCC 2d at 484; see, e.g., Bell Atlantic Reply at 3-4; PacTel at 21-22; USTA at 21-22; USTA Reply at 9-10.

[437] See, e.g., CompTel at 19-20; MCI Reply at 19.

[438] E.g., AT&T at 24-25; AT&T Reply at 19; DOJ Reply at 10; Florida Commission Reply at 4; Teleport at 20; Time Warner at 18-19; Time Warner Reply at 15-16, 20; see CompTel at 18-20.

difficulties in allocating joint and common costs."[439] For these reasons, we conclude that a BOC and a section 272 affiliate may share in-house services with each other only to the extent that such sharing is consistent with sections 272(b)(1), 272(b)(5), and 272(c)(1) of the Act.[440]

181. Consistent with section 272(b)(1), a BOC and its section 272 affiliate may not share operating, installation, and maintenance services, as discussed above.[441] In addition, as we conclude in the Accounting Safeguards Order, an agreement to provide in-house services by a BOC to its section 272 affiliate (or vice versa) constitutes a transaction between that BOC and its section 272 affiliate, so that the requirements of section 272(b)(5) govern.[442] Accordingly, such transactions must be conducted on an arm's length basis, reduced to writing, and made available for public inspection. Moreover, such transactions must be consistent with the affiliate transaction rules, as modified in the Accounting Safeguards Order.[443] In addition, the section 272 requirements that a BOC and its section 272 affiliate maintain separate books, records, and accounts, and be subject to an audit every two years should strengthen the ability of competitors and regulators to detect any inequities in cost allocation for shared services. We agree with commenters who contend that, in any event, federal price cap regulation reduces a BOC's incentives to allocate costs improperly.[444] Finally, section 272(c)(1) ensures that to the extent that a BOC provides services to its section 272 affiliate, it must make them available to the affiliate's competitors on the same rates, terms, and conditions.[445]

182. We further conclude that section 272(b)(3) does not preclude the parent company of the BOC and the section 272 affiliate from performing functions for both the BOC and the section 272 affiliate, subject to the requirements of section 272(b)(1). Similarly, an affiliate of the BOC, such as a services affiliate, could provide services to both a BOC and a section 272 affiliate. We are not persuaded by claims that the sharing of services provided to a BOC and its section 272 affiliate by a parent company or another BOC affiliate would allow the BOC and the

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[439] Computer II Final Order, 77 FCC 2d at 477, ¶ 238.

[440] 47 U.S.C. §§ 272(b)(1) and (b)(5).

[441] See infra part IV.B.

[442] See, e.g., Letter from Celia Nogales, Ameritech, to William F. Caton, Acting Secretary, FCC, Attachment at 3 (filed Sept. 19, 1996) (stating that sharing of services would be subject to section 272(b)(5) and the Part 64 rules); PacTel Reply at 11 (stating that a BOC would charge affiliates for any services it provides pursuant to the affiliate transaction rules); Letter from Gina Harrison, Director of Federal Regulatory Relations, to William F. Caton, Acting Secretary, FCC, Attachment at 14 (filed Sept. 26, 1996) (PacTel Sept. 27 Ex Parte); see also AT&T at 57; MCI at 48; TRA at 19-20.

[443] Accounting Safeguards Order part IV.B.1.

[444] See, e.g., Ameritech Reply at 13-14; Bell Atlantic Reply at 3-4; USTA Reply at 9.

[445] See infra part V.B.

section 272 affiliate to achieve an unacceptable level of integration.[446] Instead, we agree with the view that the section 272(b)(3) separate employees requirement extends only to the relationship between a BOC and its section 272 affiliate.[447] To the extent that the BOC contracts with an unregulated affiliate, it is subject to the affiliate transaction rules.[448] Moreover, a parent company or a BOC affiliate that performs services for both a BOC and its section 272 affiliate must fully document and properly apportion the costs incurred in furnishing such services.[449]

183. Consistent with our conclusions, we decline to read section 272(b)(3) to preclude the sharing of marketing services.[450] Given that section 272(g) expressly contemplates that the each entity may market or sell the services of the other, we conclude that a BOC and its section 272 affiliate may provide marketing services for each other.[451] We agree with those commenters that assert that the entities must provide such services pursuant to arm's length transactions, consistent with the requirements of section 272(b)(5).[452] Moreover, the parent of a BOC and its section 272 affiliate or another BOC affiliate may perform marketing functions for both entities.

184. Services Provided By an Outside Entity. We further conclude that section 272(b)(3) does not prohibit a BOC and its section 272 affiliate from obtaining services from the same outside supplier. Indeed, we find no statutory support for limiting permissible outsourcing, as proposed by MCI or Time Warner.[453]

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[446] E.g., AT&T at 25; AT&T Reply at 18; Teleport Reply at 5; Time Warner at 19. But see Florida Commission Reply at 5-6 (suggesting that"[a]dministrative and other activities . . . [should] only be performed by a holding company on a consolidated, limited basis and should be subject to review and approval by federal and state commissions").

[447] E.g., Ameritech at 40; Ameritech Reply at 13; Bell Atlantic at 5-6; BellSouth at 30-31; NYNEX at 23; PacTel at 17-18; SBC at 7; Sprint at 24; USTA Reply at 9; YPPA at 10-11.

[448] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1334-37, ¶¶ 284-301; recon., 2 FCC Rcd 6283 (1987); further recon., 3 FCC Rcd 6701 (1988).

[449] See 47 C.F.R. §§ 64.901-64.904; see also Sprint at 26.

[450] Moreover, as discussed above, section 272(b)(1) does not preclude joint marketing.

[451] See, e.g., NYNEX at 15; PacTel at 41; SBC at 11; U S West at 26.

[452] See, e.g., Ameritech at 50-51; PacTel at 15, 41; PacTel Reply at 11, 25; USTA at 30; USTA Reply at 14; U S West at 27; see also Ameritech Sept. 19 Ex Parte, Attachment at 3; PacTel Sept. 27 Ex Parte, Attachment at 14. Several BOC competitors argue that, to the extent joint marketing is consistent with other provisions of section 272, a separate affiliate must, at a minimum, purchase joint marketing services from the BOC on an arm's length basis. E.g. AT&T at 57; MCI at 48; TRA at 19.

[453] See MCI at 28; Time Warner at 20.

185. Nor do we construe section 272(b)(3), when read in light of section 272(b)(1), to require a BOC and a section 272 affiliate to contract with outside entities to perform their joint marketing services. We agree with the Citizens for a Sound Economy Foundation that such a requirement would reduce the BOCs' ability to serve consumers without providing additional protection against anticompetitive behavior.[454] Each entity, however, must pay its full share of any outsourced services that it receives.

186. Other activities. We reject AT&T's request that we interpret section 272(b)(3) to prohibit compensation schemes that base the level of remuneration of BOC officers, directors, and employees on the performance of the section 272 affiliate, or vice versa. We conclude that tying the compensation of an employee of a section 272 affiliate to the performance of a Regional Holding Company and all of its enterprises as a whole, including the performance of the BOC, does not make that individual an employee of the BOC.[455] Similarly, tying the compensation of a BOC employee to the performance of a Regional Holding Company and all of its enterprises as a whole, including the performance of the section 272 affiliate, does not make that individual an employee of the section 272 affiliate.

E. Section 272(b)(4)

1. Background

187. Section 272(b)(4) states that a section 272 affiliate "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]."[456] In the Notice, we tentatively concluded "that a BOC may not co-sign a contract or any other instrument with a separate affiliate that would allow the affiliate to obtain credit in a manner that violates" this section. We sought comment on what other types of activities section 272(b)(4) prohibits, whether the Commission should establish specific requirements regarding those activities, and the relative costs and benefits of such regulation.[457]

2. Comments

188. Commenters generally agree with our tentative conclusion that section 272(b)(4) prohibits a BOC from signing a contract or other instrument with an affiliate that allows a

[454] Citizens for a Sound Economy Foundation Reply at 4.

[455] See Ameritech Reply at 12-13.

[456] 47 U.S.C. § 272(b)(4).

[457] Notice at ¶ 63.

creditor, upon default, to have recourse to the BOC's assets.[458] Time Warner and others contend that no regulations are necessary to implement this provision.[459] In contrast, TIA urges us to adopt regulations precluding all arrangements that would result in the BOC having direct or indirect responsibility for the financial obligations of the separate affiliate.[460] AT&T and Teleport further suggest that we should preclude a BOC affiliate from obtaining credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of any parent of the BOC.[461]

3. Discussion

189. As we stated in the Notice, the intent of this provision is to protect ratepayers from shouldering the cost of a default by a section 272 affiliate.[462] We adopt our tentative conclusion that section 272(b)(4) prohibits a BOC from co-signing a contract or any other instrument with a section 272 affiliate that would allow the affiliate to obtain credit in a manner that grants the creditor recourse to the BOC's assets in the event of default by the section 272 affiliate. Moreover, because the provision precludes the section 272 affiliate from obtaining credit under "any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]," we find that section 272(b)(4) likewise prohibits the parent of a BOC or any non-272 affiliate from co-signing a contract or any other arrangement with the BOC's section 272 affiliate that would allow the creditor to obtain such recourse to the BOC's assets in the event of default by the section 272 affiliate. Indeed, we conclude that section 272(b)(4) prohibits a section 272 affiliate from entering into any arrangement to obtain credit that permits the lender recourse to the BOC in the event of default.

190. While preventing the affiliate from jeopardizing ratepayer assets, we conclude that section 272(b)(4) does not forbid a section 272 affiliate from using assets other than its own as collateral when seeking credit. To impose such a restriction where, as here, it is not needed to protect ratepayer assets, would force section 272 affiliates to operate inefficiently, to the detriment

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[458] E.g. AT&T at 26-27 (urging us to require "that any contract or other document in which an affiliate obtains credit contain a provision expressly stating that the creditor, upon default by the affiliate, has no recourse to the assets of the BOC"); Bell Atlantic, Exhibit 1 at 6-7; MCI at 29; Ohio Commission at 9; Sprint at 27; TIA at 28; TRA at 14.

[459] Bell Atlantic, Exhibit 1 at 6-7; NYNEX Reply at 20; Time Warner at 18; USTA at 22.

[460] TIA at 28-29 (urging us to forbid "any reference to the [affiliated] BOC in debentures, reference to the BOC in any equity instruments, use of the same underwriting facilities, or other arrangements" that shift responsibility for cost, debt, equity, or business risk to the BOC away from the affiliate); see also CompTel at 18 (urging us to prohibit all credit arrangements between BOCs and their affiliates).

[461] AT&T at 27 n.27; Teleport at 20-21. But see NYNEX Reply at 20-21 (countering that section 272(b)(4) cannot be read to extend to the assets of a BOC's parent); Bell Atlantic Reply at 5.

[462] Notice at ¶ 63.

of consumers and competition. In particular, we agree with MCI and Sprint that a BOC's parent could secure credit, whether through the issuance of bonds or otherwise, for the benefit of the section 272 affiliate, provided that BOC assets are not at risk.[463]

F. Section 272(b)(5)

1. Background

191. Section 272(b)(5) states that an affiliate "shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[464] In the Notice, we sought comment on whether this provision necessitates the adoption of any non-accounting safeguards.[465]

2. Comments

192. Several parties contend that we need not adopt additional non-accounting safeguards, stating that other provisions of section 272(b) and accounting regulations should suffice to implement section 272(b)(5).[466] Other commenters propose that we adopt a broad definition of "transaction" to prevent improper cost allocation and to facilitate monitoring of the BOCs' compliance with the nondiscrimination requirements.[467] CompTel urges us to use this provision to impose several of the requirements established in the Ameritech Customers First Plan, Ameritech's plan to offer in-region interLATA service through an interexchange affiliate, including annual reporting and audit requirements, information disclosure requirements, and a requirement that an interexchange subsidiary "purchase any inputs or data from the BOC local exchange operations on the same rates, terms, and conditions" that are available to unaffiliated carriers.[468]

3. Discussion

193. We conclude that we need not adopt additional non-accounting safeguards to implement section 272(b)(5). In the Accounting Safeguards Order, we address the definition of

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[463] See, e.g., MCI at 29; Sprint at 28.

[464] 47 U.S.C. § 272(b)(5).

[465] Notice at ¶ 64.

[466] E.g., PacTel at 23-24; Teleport at 21; USTA at 22-23. Other commenters do not advocate particular safeguards but view the provision as supplementing or reinforcing other provisions of section 272. E.g., MCI at 29-30; Sprint at 28-29 (advocating interpretation similar to "operate independently" requirement); TIA at 30.

[467] E.g., AT&T at 27-29; ITAA at 19-20.

[468] CompTel at 17.

"transactions" and consider the provision's requirement that all transactions be "reduced to writing and available for public inspection."[469] Moreover, in our discussion of sections 272(b)(1) and (b)(3), we make clear that "transactions" include the provision of services and transmission and switching facilities by the BOC and its affiliate to one another. We reject CompTel's proposal to adopt additional requirements, which are addressed generally in other parts of this Order and the companion Accounting Safeguards Order.[470]

V. NONDISCRIMINATION SAFEGUARDS

194. As we observed in the Notice, after a BOC enters a competitive market, such as long distance, it may have an incentive to use its control of local exchange facilities to discriminate against its affiliate's rivals. Section 272(c) of the Act responds to these competitive concerns by establishing nondiscrimination safeguards that apply to the BOCs' provision of manufacturing, interLATA telecommunications, and interLATA information services. We address the requirements of this section below.[471]

A. Relationship of Section 272(c)(1) and Pre-existing Nondiscrimination Requirements

1. Background

195. Section 272(c)(1) states that "[i]n its dealings with its affiliate described in subsection (a), a [BOC] (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[472] In the Notice, we sought comment on the relationship between the nondiscrimination obligations imposed by sections 272(c)(1) and the Commission's pre-existing nondiscrimination obligations in sections 201 and 202.[473] In particular, we sought comment on whether the flat prohibition against discrimination in section 272(c)(1) imposes a stricter standard for compliance than the "unjust and unreasonable" standard in section 202.[474]

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[469] Accounting Safeguards Order part IV.B.1.e.

[470] In particular, see our rejection of additional reporting requirements in part IX and our discussion of sections 272(c) and (e). We agree with Ameritech that in proposing an annual audit requirement, CompTel ignores the biannual audit requirement of section 272(d) of the Act. See Ameritech Reply Comments at 5 n.9; CompTel at 17.

[471] We note that the nondiscrimination requirement of section 272(c)(2) is an accounting safeguard that is addressed in the Accounting Safeguards Order.

[472] 47 U.S.C. § 272(c)(1).

[473] Notice at ¶ 69.

[474] Id. at ¶ 72.

2. Comments

196. Many BOCs assert that Congress did not intend to impose a stricter nondiscrimination standard in section 272(c)(1) than that contained in section 202.[475] For example, BellSouth, U S West, and USTA claim that the term "discriminate" in section 272(c)(1) includes unjust and unreasonable discrimination and, therefore, is not materially different from the standard of section 202.[476] Potential competitors and various trade associations, in contrast, assert that the flat prohibition in section 272(c)(1) was clearly intended to be more stringent than the general ban on "unjust and unreasonable" discrimination in section 202.[477] These commenters argue, therefore, that the unqualified prohibition against discrimination in section 272(c)(1) should be construed as stringently as similarly unqualified language in section 251(c)(2) was in the First Interconnection Order.[478]

3. Discussion

197. We find that section 272(c)(1) establishes an unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities. Section 202(a), by contrast, prohibits "any unjust or unreasonable discrimination . . . , or . . . any undue or unreasonable preference or advantage."[479] Because the text of the section 272(c)(1) nondiscrimination bar differs from the section 202(a) prohibition, we conclude that Congress did not intend section 272's prohibition against discrimination in the 1996 Act to be synonymous with the "unjust and unreasonable" discrimination language used in the 1934 Act, but rather, intended a more stringent standard. We therefore reject the arguments of those who argue that the section 272(c)(1) standard is not materially different from the standard in section 202.[480]

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[475] Bell Atlantic, Exhibit 1 at 7; BellSouth at 3-4; PacTel at 29; PacTel Reply at 12-13; U S West at 32; USTA at 25; YPAA at 12.

[476] BellSouth at 32; U S West at 32; USTA at 25.

[477] AT&T Reply at 24; CIX Reply at 5-6; CompTel at 22; IDCMA at 6; ISA at 2; ITI and ITAA Reply at 14; LDDS at 13, n.13; LDDS Reply at 7-8; MCI at 34; Sprint at 39-40; TIA at 37; TIA Reply at 4-5; Time Warner at 21-22; TRA at 15; Voice-Tel at 13-14.

[478] AT&T Reply at 23-24; CompTel at 22; ISA at 2; LDDS Reply at 7-8; MCI at 34; MCI Reply at 23; TIA Reply at 10-12; Time Warner at 21-22; Time Warner Reply at 20-22.

[479] 47 U.S.C. § 202(a).

[480] We note that this conclusion is consistent with the Commission's recent interpretation of similar language in section 251(c)(2). See First Interconnection Order at ¶ 217.

B. Meaning of Discrimination in Section 272(c)(1)

1. Background

198. We tentatively concluded in the Notice that the prohibition against discrimination in section 272(c)(1) means, at a minimum, that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates, and must provide and procure goods, services, facilities, and information to and from these other entities under the same terms, conditions, and rates.[481] We noted, however, that a requesting entity may have equipment with different technical specifications than the equipment of the BOC section 272 affiliate. We sought comment, therefore, on whether the terms of section 272(c)(1) could be construed to require a BOC to provide a requesting entity with a quality of service or "functional outcome" identical to that provided to its affiliate even if this would require the BOC to provide goods, facilities, services, or information to a requesting entity that are different from those provided to the affiliate.[482]

2. Comments

199. Both BOCs and potential competitors agree with our tentative conclusion that section 272(c)(1) requires a BOC to treat all other entities in the same manner as it treats its section 272 affiliate.[483] LDDS asserts that, if the BOC affiliate is required to obtain local exchange service in the same fashion as competitors, it is much more likely that the BOC will provide local exchange service on a nondiscriminatory basis, at nondiscriminatory prices, and with adequate operational support.[484]

200. BOCs claim, however, that this section does not require a BOC to provide a requesting entity with a quality of service or a functional outcome identical to the section 272 affiliate in order to offset differences in technical design, architecture, software or performance specifications between the affiliate's network and that of the requesting carrier.[485] They assert

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[481] Notice at ¶ 73.

[482] Notice at ¶ 67. We suggested, for example, that such disparate treatment may be justified by differences in the unaffiliated entity's network architecture. Id. at ¶ 73.

[483] See, e.g., Ameritech at 54, U S West at 34-35; see also Frontier at 5-6; IDCMA at 6; ISA at 2-3; LDDS at 14-15; LDDS Reply at 6 (BOCs cannot take any action in regards to its affiliate without offering the very same deal to any other competing entity); MCI at 36; MFS Reply at 20-21; Sprint at 39; Teleport at 14; TIA at 38-39; Time Warner at 22; Voice-Tel at 14 (all services and facilities provided by a BOC to its affiliate should be pursuant to tariff). Some BOCs maintain, however, that section 272(c)(1) does not require identical treatment between a BOC affiliate and an unaffiliated entity in the provision of administrative and "corporate governance" services, and non-telecommunications facilities or goods. We will discuss this issue below. See infra part V.C.

[484] LDDS at 15.

[485] See, e.g., BellSouth at 32; NYNEX Reply at 22.

that unlawful discrimination occurs only when similarly situated entities are treated differently; it is not unlawfully discriminatory under section 272(c)(1) for a BOC to treat differently unaffiliated companies whose capabilities or requirements vary from those of the BOC's affiliate.[486]

201. Potential competitors, on the other hand, argue that a BOC should be required to provide different goods, services, and facilities to other entities than it provides to its own affiliate in order to provide "functional equality" or service of equal quality.[487] Sprint concedes that different treatment is permissible if required by variations in network architecture between the section 272 affiliate and the unaffiliated entity and if the prices charged to different entities receiving disparate treatment are based on costs.[488] AT&T points out that, if nondiscrimination in section 272(c)(1) means only that a BOC has to provide the goods, services, facilities, and information to an unaffiliated entity that it provides to its own affiliate, the options available to competitors would be confined entirely to those the BOC affiliate finds useful.[489] This, some commenters claim, may give BOCs an incentive to design interfaces that work optimally only with its affiliate's specifications and not the specifications of other entities[490] or to discriminate against unaffiliated entities by anticompetitively cooperating in the development of new services with its affiliate.[491]

3. Discussion

202. We affirm our tentative conclusion that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates. We conclude therefore that, pursuant to section 272(c)(1), a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.[492] We decline, as some commenters suggest, to interpret section 272(c)(1) more

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[486] See Ameritech at 55-56; BellSouth at 32; NYNEX Reply at 22; U S West at 33.

[487] See, e.g., AT&T at 31; MCI at 31; Sprint Reply at 15; TRA at 16.

[488] Sprint at 39; Sprint Reply at 15; see also Time Warner at 22-23; Time Warner Reply at 22 (allowing prices to reflect underlying costs of providing a good, service, or facility does not demonstrate that discrimination is just and reasonable, rather it allows BOCs to demonstrate that no discrimination is present because the price accurately reflects the cost of provision).

[489] AT&T Reply at 21; see also AT&T at 32 (if an unaffiliated entity requests new access arrangements that will allow new or more cost effective long distance services, the Commission should not permit a BOC to deny the request on the ground that everyone is receiving the same access at the same price).

[490] AT&T at 31; MCI Reply at 22; Sprint Reply at 15.

[491] AT&T Reply at 21-22; see also AT&T at 32.

[492] The BOCs' obligations with respect to procurement under section 272(c)(1) are discussed below. See infra part V.E.

broadly to conclude that a BOC must provide unaffiliated entities different goods, services, facilities, and information than it provides to its section 272 affiliate in order to ensure that it is providing the same quality of service or functional outcome to both its affiliate and unaffiliated entities. To do so would, in effect, be interpreting this section the same way we interpreted section 251(c)(2) in the First Interconnection Order. We believe that to interpret the nondiscrimination requirement of section 272(c)(1) in this manner would be inappropriate as a matter of statutory construction, inconsistent with its legislative purpose, and unenforceable.

203. As a matter of statutory construction, we find that the nondiscrimination provision of section 272(c)(1), by its terms, is much narrower in scope than the requirement in section 251(c)(2). Section 251(c)(2) imposes on incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . that is at least equal in quality to that provided by the [LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[493] In the First Interconnection Order, we interpreted the term "equal in quality" as requiring an incumbent LEC to provide interconnection to its network at a level of quality that is at least indistinguishable from that which the incumbent LEC provides itself. Further, we found that, to the extent a carrier requests interconnection that is of a superior or lesser quality than the incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection to the extent technically feasible.[494]

204. The language of section 272(c)(1), in contrast, contains no such "equal in quality" requirement; it simply requires that unaffiliated entities receive the same treatment as the BOC gives to its section 272 affiliate. Unlike section 251, therefore, section 272(c) is not a vehicle by which requesting entities can require a BOC to provide goods, facilities, services, or information that are different from those that the BOC provides to itself or to its affiliates.[495] Nor is it, as some commenters suggest, designed to prevent a BOC from discriminating between unaffiliated competitors.[496]

205. Our reading of the statutory language of sections 251 and 272 is consistent with the differing underlying purposes of those provisions. The section 251 requirements are designed to ensure that incumbent LECs do not discriminate in opening their bottleneck facilities to competitors. As we stated in the First Interconnection Order, "[u]nder section 251, incumbent

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[493] 47 U.S.C. § 251(c)(2).

[494] First Interconnection Order at ¶¶ 224-25, 314.

[495] Ameritech at 56; see also Ameritech Reply at 28 (to obligate a BOC to provide a different service to an unaffiliated entity at the same price that it is charging an affiliate for another service, even though the costs are different, is at odds with the section 252(d) cost-based pricing requirements for interconnection, unbundled elements, and reciprocal compensation arrangements.)

[496] See, e.g., MCI at 51-52.

[LECs], including [BOCs], are mandated to take several steps to open their network to competition, including providing interconnection, offering access to unbundled elements to their networks, and making their retail services available at wholesale rates so that they can be resold."[497] In implementing section 251, therefore, we adopted rules to open one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access market.[498]

206. In adopting rules in this proceeding, however, our goal is to ensure that BOCs do not use their control over local exchange bottlenecks to undermine competition in the new markets they are entering -- interLATA services and manufacturing. The section 272 safeguards, among other things, are intended to protect competition in these markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage. We find that when viewed in this context, the section 272(c)(1) nondiscrimination provision is designed to provide the BOC an incentive to provide efficient service to rivals of its section 272 affiliate, by requiring that potential competitors do not receive less favorable prices or terms, or less advantageous services from the BOC than its separate affiliate receives.

207. We find that interpreting section 272 to require "functional equality" between a BOC section 272 affiliate and any unaffiliated entity would not only be impractical, but unenforceable. The "functional equality" standard would require a BOC to provide additional services or functions to other entities that it does not provide to its own affiliate.[499] Because section 272, unlike section 251, contains no requirement that a BOC must provide goods, services, facilities, and information to the extent "technically feasible," it would be extremely difficult, as a practical matter, to limit the types of goods, services, and facilities that a BOC would be obligated to provide to requesting entities. Further, the terms "functional outcome" or "functional equality" are likely to mean different things to different entities. Because the meaning of these terms is likely to depend on the particular characteristics of each requesting entity, the Commission would be required to apply this standard to a myriad of factual circumstances on a case-by-case basis. As one commenter observes, ensuring this type of equality would be impossible to do, as well as impossible to enforce.[500]

208. We reject the argument that, because our interpretation of section 272(c)(1) effectively limits competitors to those options that the BOC affiliate finds "useful," a BOC will be able to design network interfaces that work optimally only with its section 272 affiliate's specifications and not with the specifications of other entities. Section 272(c)(1) prohibits a BOC from discriminating in the establishment of standards. As we conclude below, a BOC's adoption

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[497] First Interconnection Order at ¶ 4.

[498] See id.

[499] See USTA at 23-24; USTA Reply at 12.

[500] PacTel Reply at 12.

of a network interface that favors its section 272 affiliate and disadvantages an unaffiliated entity will establish a prima facie case of discrimination under section 272(c)(1).[501] Further, section 272(c)(1) prohibits a BOC from discriminating in the provision of facilities or information, and section 251(c)(5) imposes upon BOCs certain network disclosure requirements.[502] As mentioned above, section 251(c)(5) requires incumbent LECs to provide reasonable public notice of network changes affecting competing service providers' performance or ability to provide telecommunications services, as well as changes that would affect the incumbent LEC's interoperability with other service providers. In the Second Interconnection Order, we interpreted this provision to require incumbent LECs to disclose changes subject to this requirement at the "make/buy" point.[503] In light of the requirements of sections 272(c)(1) and 251(c)(5), we decline at this time to impose additional obligations on the BOCs to ensure that they structure their own networks to achieve the same level of interoperability that the section 272 affiliate receives from the BOC.

209. We also decline to adopt MCI's suggested presumption that the specifications requested by an unaffiliated entity are the appropriate ones for a truly separate and independent affiliate and that any different specifications needed by the BOC's section 272 affiliate reflect a lack of proper physical and operational separation from the BOC.[504] We recognize that there may be circumstances, such as the adoption of a new and innovative technology by the BOC section 272 affiliate, where differences in technical specifications between a section 272 affiliate and an unaffiliated entity do not evidence a lack of structural separation between the BOC and its section 272 affiliate.

210. As discussed below, we conclude that the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate.[505] We therefore agree with AT&T that to the extent a BOC develops new services for or with its section 272 affiliate, it must develop new services for or with unaffiliated entities in the same manner. That is, we find that the development of new services, including the development of new transmission offerings, is the provision of service under section 272(c)(1) that, once provided by the BOC to its section 272 affiliate, must be provided to unaffiliated entities in a nondiscriminatory manner. In the Notice, we recognized the potential for competitive harm in

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[501] See infra paragraph 229.

[502] We conclude below that the information required to be disclosed under section 251(c)(5) is included within the definition of "information" under section 272(c)(1). See infra at paragraph 222.

[503] See Second Interconnection Order at ¶¶ 216-217 for a discussion of the "make/buy" point; see also id. at ¶ 224 (incumbent LECs should not make preferential disclosure to selected entities prior to disclosure at the make/buy point).

[504] See MCI at 31-32 (if the BOC section 272 affiliate is truly separate it should not require services or facilities that are technically different than those required by its competitors)

[505] See infra part V.C.

a situation in which a BOC failed to cooperate with an interLATA carrier that is introducing an innovative new service until the BOC's section 272 affiliate is ready to initiate the same service.[506] Similarly, AT&T asserts that the section 272(c)(1) nondiscrimination requirement should be interpreted to prevent BOCs from denying a competitor's request for a new or more cost effective access arrangement on the ground that all entities, including its section 272 affiliate, are receiving the same access service at the same price.[507] We find that the BOC, under section 272(c)(1), is obligated to work with competitors to develop new services if it cooperates in such a manner with its section 272 affiliate.

211. We agree with AT&T therefore that if, as we outlined in our Notice, a BOC purposely delayed the implementation of an innovative new service by denying a competitor's reasonable request for interstate exchange access until the BOC section 272 affiliate was ready to provide competing service, such conduct may constitute unlawful discrimination under the Act. Moreover, as we observed in the Notice, although the 1996 Act imposes specific nondiscrimination obligations on the BOCs and their section 272 affiliates, the Communications Act imposed certain pre-existing nondiscrimination requirements on common carriers providing interstate communications service. Among them, section 201 provides that all common carriers have a duty "to establish physical connections with other carriers," and to furnish telecommunications services "upon reasonable request therefor."[508] We conclude, therefore, that if a BOC were to engage in strategic behavior to benefit its section 272 affiliate, in the manner suggested by AT&T, such action may not only violate section 272(c)(1), but would also violate sections 201(a) of the Act.[509]

212. Finally, we conclude that a complainant will be found to have established a prima facie case of unlawful discrimination under section 272(c)(1) if it can demonstrate that a BOC has not provided unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions. To rebut the complainant's case, the BOC may demonstrate, among other things, that rate differentials between the section 272 affiliate and unaffiliated entity reflect differences in cost or that the unaffiliated entity expressly requested superior or less favorable treatment in exchange for paying

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[506] Notice at ¶ 139 n.266.

[507] AT&T at 32.

[508] 47 U.S.C. § 201(a).

[509] We also note such anticompetitive behavior regarding the provision of intrastate services would be unlawful under various state provisions. See, e.g., Mich. Comp. Laws Ann. § 484.2305(1)(g) (West 1996) (a provider of basic local exchange service shall not refuse or delay access service or be unreasonable in connecting anther provider to the local exchange whose product or service requires novel or specialized access service requirements); N.Y. Pub. Serv. § 91 (McKinney 1996); N.D. Cent. Code § 49-21-07 (1995).